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## Note

### Liberal Understanding, Shortcoming, and Controversy apropos Group Rights: Do We Need a Different Paradigm?

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#### 1. Prologue:

Liberal attitude towards group rights is a dubious one. For quite a long time, liberals considered any idea of group identity a threat to individualism; hence there was no justification for devolving any right to 'groups'. History of mankind is marked with incidents of brutality against individuals, especially women, in the name of religion or culture. Once liberalism came with the message of emancipation for individuals, there was no reason to let religious and cultural dogmas rule over freedom again. Historically, on the other hand, various minority groups had been victims of majority oppression. Therefore, it was also felt necessary to protect these minority groups for the sake of humanity or for international or national stability. The Peace of Augsburg (1555), the Pact of Warsaw (1573), and the Edict of Nantes (1598) are some of the early mechanisms for protecting religious minorities. However, with the emergence of liberal

ideology as a dominant philosophy in the international plane, the idea of minority rights started to be considered redundant. Instead, it was believed that liberal-individualism could effectively guarantee necessary protections for various minority groups be it religious, linguistic, cultural or ethnic. Since then, a sharp line of distinction has been visible keeping liberals (advocates of individual rights) and communitarians (proponents of group rights) in two sides of the line. For liberals, individual is more important than community and community is important only as long as it contributes to individual well-being. For communitarians, on the other hand, community comes first as individual well-being and autonomy is deeply rooted in community life.

The collapse of Berlin Wall was considered a landslide victory of liberal ideology. Hope was so high that Fukuyama even called it the 'end of history' as he saw the progression of human history as a struggle between ideologies coming to an end with the world settling on liberal democracy after the end of the Cold War.<sup>1)</sup> But this hope was short-lived. Ethnic cleansing in former Yugoslavia and Rwanda put a big question mark to that hope. Even in Western democracies like Canada, Belgium, and Spain, group resentment is very much prevalent. Even after almost one decade of signing the Belfast Peace Agreement, ethnic tensions in Northern Ireland sometimes take space in the pages of newspapers. Besides, various diasporas within Western democracies are now more organized than before as a result of incessant technological inventions that helped in reviving ethnic identity by providing with cheaper way of communications. At the same time, market economy has brought home ethnic television channels or even ethnic foods. The hope that in this increasingly globalized world various cultures will converge into one culture has been reduced to absurdity. Perhaps, all these real life experiences provoked liberals to revisit the whole idea of liberal-

individualism and come up with an accommodative liberal framework to address the issues of group rights. Consequently, the sharp line of distinction between communitarians and libertarians started getting blurred with the emergence of an accommodative conception that individual rights and group rights are not mutually exclusive and it is possible to accommodate group rights within liberal framework. The proponents of this argument, Yael Tamir, Joseph Raz, and Will Kymlicka, acknowledge that there are compelling interests related to culture and identity which are fully consistent with liberal principles of freedom and equality, and which justify granting special rights to minorities. Kymlicka calls this the 'liberal culturalist' position.

In the following sections, I will critically examine this 'liberal culturalist' position of Will Kymlicka with a view to demonstrating that even this moderate position is incompatible, at least theoretically, with the idea of group rights. One obvious implication of this assertion is that we need a different paradigm to address this vital shortcoming. The scope of this paper is limited to this aspect only, and no detailed discussion on any alternative paradigm is made here.

## 2. 'Can Liberalism Accommodate Group Rights?'— A Communitarian Challenge for Kymlicka:

Vernon Van Dyke<sup>2)</sup>, a veteran communitarian, answers this question in negative. He presents a historical account of how liberal political theorists like Hobbes, Locke, and Rousseau eliminated any political identity between State and individuals. He finds the same phenomenon in the work of Rawls who put individuals in the 'original positions'. His criticism goes to Mill and Barker as well for their individualistic approach.<sup>3)</sup> Unlike them, Van Dyke finds historic

precedents exist and contemporary practices are followed that go against liberal individualistic position; the establishment of the State itself is one such great historic precedence. In his words:

“[T]he notion that all individuals somehow consent to the jurisdiction of the state is an obvious fiction. A more tenable position (...) is that human needs exist at various levels (...), and that the existence of needs implies a right to meet them ... This principle justifies individual rights, and it also justifies the rights of communities, including the communities (or the communities of communities) that constitute states. At no level are the rights absolute. At each level and between levels, rights and their exercise are limited by other rights. Within limits reached after considering the relevant rights, the meeting of the needs of community - or the promotion of the good of the community - justifies restrictions on the behaviour of individuals, whether they consent or not.”<sup>6)</sup>

His argument in favour of group rights has its base on two assumptions: first, the communities have rights as separate units and in some cases these rights are not reducible to the rights of individuals as members, and second, these rights may reflect moral claims. He exemplified the first assumption with the British practice in many of her colonies where British conferred legal rights to communities. British practice for colonies is evident in many independent countries. In Belgium, rights have been devolved to linguistic communities. In Fiji, special land right is guaranteed for the Fijian in the constitution. He comments on this arrangement that it is “obviously communal, giving land rights to the community as such on a collective, corporate basis. To seek to reduce these communal rights to individual rights is to strain to preserve a paradigm that

does not fit.”<sup>7)</sup> The same analogy applies to other countries where there is a practice of granting group rights. Even in the US, community right is acknowledged for Indians. “Legislation concerning the Indians reflects different and contradictory principles, but some of it assumes that the tribes are like sovereign states in being irreducible right-and-duty-bearing units.”<sup>8)</sup> We can add many more to Van Dyke’s examples. Malaysia has been successfully pursuing this policy for many years to keep harmony among ethnic Malays, Chinese, and Indian communities. Lebanon is another example.

Defending his second assumption that rights that should be accorded to groups should also be thought of as reflecting moral claims, Van Dyke questions: “Why should the possibility be ruled out that the authority of the state should be limited not only by the moral rights of individuals (“inalienable” or human rights), but also by the moral rights of groups?”<sup>9)</sup> He asserts that the grant of legal status and rights to groups in many countries may well be in response to a moral claim. Similarly, the right to self-determination as a moral right is given to groups, and most importantly this group right is not conflicting with individual rights. To quote him: “There is never a thought that when a people exercise its right to self-determination, the outcome might violate an individual right. No violation occurs even in the case of those who oppose the outcome. They retain the right to leave the group, but they have no right of protection against the group’s decision, and no right of redress ... The foregoing suggest that it is the corporate unit that enjoys the right; the most that an individual can claim is a right to participate in the corporate choice.”<sup>10)</sup> In a different work<sup>11)</sup>, he criticises liberal attitude towards the right to self-determination by saying that liberals who champion this right for nations or peoples tend to think of a nation or people not as a collective entity but as an aggregation of individuals. He dismantles this

conception and asserts that though individuals have interest in being grouped, that does not necessarily mean that the related right goes to individuals.

Van Dyke's criticism extended to pluralists as well. Like some liberalists, he argues, most of the pluralists consider various interest groups between individual and states. But ethnic communities failed to attract their attention. The problem with interest group in such a position is that they pursue, in Van Dyke's term, 'individualistic values'. Given this background, his assertion is justified: "The liberal conception - an individualist conception - is unduly limited ... Considering the heterogeneity of mankind and of the population of virtually every existing state, it is also necessary to think of ethnic communities and certain other kinds of groups, and to include them among the kinds of right-and-duty-bearing units whose interrelationship are to be explored."<sup>12</sup> His another attack on liberal-individualism comes in the following way:

"It is unjust to accept or assume status and rights for states, nations, and "peoples," but to reject them for ethnic communities that are also historically constituted. And it is even unjust to individuals to say that those who belong to dominant groups can enjoy the attendant advantages and satisfactions, whereas those who belong to nondominant and minority groups must either abandon their culture or accept second class status."<sup>13</sup>

Van Dyke portrays inherent drawbacks in liberalism with the case of liberal response to indigenous communities. Liberals acknowledge rights for persons belonging indigenous communities, on the other hand, history shows that the indigenous are as a rule not capable of upholding either their rights or their interests in free and open individualistic competition with their more advanced counterparts. His comment on this contrast is a vital response to the question I

started with: can liberalism accommodate group rights. To quote him:

"[T]he liberal, moved by human concerns, has to favour some kind of a special, protective regime for [indigenous people] - perhaps establishing territorial reserves from which others are excluded. But this is contrary to liberal doctrine, which is at least integrationist if not assimilationist; permanent communalism is unacceptable. And so the liberal is torn. What he usually does is to say that the special measures for the indigenous are transitory, pending developments that permit integration. But if independence is impractical, permanent communalism may be exactly what the indigenous want ...

The trouble is that the liberal has no place in his theory for peoples as distinct political units within the state. Individuals are the units, and when individuals are divided up for governmental purposes, it must be on a territorial basis and not on the basis of ethnic differences ... There seems to be no place in the liberal's thought for the possibility that an indigenous population might want to preserve its distinctive identity indefinitely."<sup>14</sup>

This is how Van Dyke explains liberal shortcomings in dealing with group rights. It is not that liberals do not care about groups; but the problem is the way they tend to respond to group needs, i.e. the individualistic approach, is very often disproved by practice. This gap between theory and practice, in communitarian understanding, marks the inherent lacking in liberal-individualism. And this is exactly where communitarians take a solid stand by asserting that individualism alone cannot be a proper response to group rights; hence the obvious conclusion as drawn by Van Dyke is that "liberalism needs

supplementing".<sup>15)</sup> The proposed supplement is to recognize the existence of groups as well as rights for those groups. We suppose, by supplementing he did not mean a different reading of liberal thought. Rather, given the theoretical limitations of liberal-individualism, he urged for a distinct set of principles that recognizes group existence and group rights. Here we find a definite communitarian answer to our question that liberalism cannot, in theory, accommodate group rights; and pragmatic practices of group differentiated rights by liberals strike at the very root of their theory. The following sections will trace how Kymlicka responds to this challenge put forward by the communitarians and what are the shortcomings of such response.

### 3. Liberal Culturalism: An Insufficient Response to Communitarian Critique

Liberal political philosopher Will Kymlicka put forward his famous theory of 'liberal culturalism' in his seminal work *Multicultural Citizenship*<sup>16)</sup> which has been criticized by both the liberal and communitarian schools. His argument starts with the assertion that in virtually all liberal democracies, a distinction is drawn between immigrants and national minorities. In Western democracies, immigrants are expected to integrate into the mainstream society, and this expectation is backed up with the force of laws and public policies. On the other hand, national minorities are viewed in a different way. Unlike the eighteenth and nineteenth century practices, over the course of this century a new attitude has developed which allowed states to accord national minorities various self-government powers. In other words, Kymlicka points that Western democracies have a long standing practice of granting differentiated treatment for national minorities. Therefore, the motivation for his book was to see whether he could

close the gap between practice and theory - to see if he could find an adequate justification within liberal theory for this differential treatment.<sup>17)</sup> Now recalling Van Dyke's criticism of liberal-individualism, we see that this is exactly what he wanted the liberals to explain. Kymlicka picked the right challenge, indeed.

In his venture of closing the gap between liberal theory and practice, Kymlicka's liberal justification for differentiated treatment for national minority groups goes this way<sup>18)</sup> : modern states invariably develop and consolidate a 'societal culture'<sup>19)</sup> which requires the standardization and diffusion of a common language, and the creation and diffusion of common educational, political, and legal institutions. Indeed, the state is the leading force behind these efforts. These societal cultures are profoundly important to liberalism as liberal values of freedom and equality must be defined and understood in relation to such societal cultures. Liberalism rests on the value of individual autonomy but what enables this sort of autonomy is the fact that our societal culture makes various options available to us. Freedom is the ability to explore and revise the ways of life which are made available by our societal culture. Similarly, equality of opportunity is another pillar of liberalism, but what makes this equality possible is the diffusion of a common language and institution throughout society. Equality is, in the first instance, a matter of equal opportunity to participate in these common institutions. Therefore, to ensure freedom and equality for all citizens involves, *inter alia*, ensuring that they have equal membership in, and access to, the opportunities made available by the societal culture. Hence, membership in a societal culture is necessary for liberal freedom and equality. In this connection, freedom and equality for immigrants requires freedom and equality within mainstream institutions by promoting linguistic and institutional integration, on the one hand, and by reforming those common institutions, on the other, so that

linguistic and institutional integration does not require denial of their ethnocultural identities. But in the case of national minorities<sup>20)</sup>, the case is quite different. These groups already possessed a societal culture and they have fought to maintain these institutions. Their demands for special language rights and regional autonomy have increasingly been accepted by liberal democracies. Group-differentiated treatment of this sort is not a violation of liberal principles, for to expect the members of national minorities to integrate into the institutions of the dominant culture is neither necessary nor fair. Freedom for them involves the ability to live and work in their own societal culture. In short, the aim of a liberal theory of minority rights is to define fair terms of integration for immigrants, and to enable national minorities to maintain themselves as distinct societies.

Kymlicka's theory is significant for its efforts to accommodate group rights within a liberal framework. Most importantly, like communitarians, Kymlicka recognized the gap between theory and practice apropos group rights in liberal societies, and urged for incorporating group rights within the theoretical framework. However, Kymlicka's liberal culturalist position is not sufficient in itself. We identify at least three inherent shortcomings in his theory that do not allow it to be a sufficient response to communitarian challenge. The subsequent sections touch upon these shortcomings.

### 3.1. *Kymlicka's 'Illiberal' Response to 'Illiberal' Groups:*

What is Kymlick's response toward groups that are 'illiberal'? In other words, to what extent Kymlicka is ready to compromise basic liberal rights of individual members of a group to accommodate right for that group? His response to this is

quite a straightforward one: "Minority rights are consistent with liberal culturalism if (a) they protect the freedom of individuals within the group; and (b) they promote relations of equality (non-dominance) between groups."<sup>21)</sup> In other words, according to this theory, minority groups can assert right as against the state or other groups, but within the group individual rights will prevail over group rights. This arrangement is quite obvious as long as Kymlicka calls it a 'liberal theory'. However, Kymlicka's idea of subjecting group rights to the enjoyment of liberal rights by the individual members can be criticized from communitarian perspective as "it is all too easy to judge societies by standards they do not recognize".<sup>22)</sup> The precondition that Kymlicka set, in fact, undermines many forms of cultural community, especially those that fail in their practices to conform to liberal principles. This is not a uniform liberal position. Another acclaimed liberal scholar Chandran Kukathas<sup>23)</sup> opts for a different approach. Unlike Kymlicka, Kukathas does not set any precondition for the enjoyment of group rights. Actually, there is no group *right* in his thesis. His theory solely depends on 'individual choice'. As long as individuals choose to remain with a group, liberal or illiberal, outside society is not entitled to intervene in the internal affairs of that group. Yet, with this individualism, he believes, communities are given a considerable amount of power over the individuals. If membership to a cultural community is voluntary, and if the outside society has no right to intervene in the internal affairs of that community, it follows that to remain as a member of that community, individuals must stick to the rules of that community. Therefore, he exemplifies, as a citizen of a liberal society, a Muslim has a right of free speech; but as a Muslim, however, he has no right to challenge Islam's fundamental tenet. Kukathas believes that in this way some protection is given to cultural communities without deviating from basic liberal principles. "[T]he primacy of freedom of association is all-important; it has to take priority

over other liberties - such as those of speech or worship - which lies at the core of the liberal tradition."<sup>24)</sup> This argument by Kukathas is not beyond debate, but the point to be made here is that Kymlicka's response to 'illiberal' groups violates the liberal principle by giving preference to liberalism. Liberalism is supposed to be colour-blind.

Weakness of Kymlicka's 'liberal' response to 'illiberal' groups becomes more visible if we juxtapose it with a more conservative proposition by another eminent liberal theorist Brian Barry.<sup>25)</sup> Like Kukathas, Barry also believes that it is no part of liberalism to insist that every group must conform to liberal principles in its internal structure. In his understanding, the fundamental liberal position on group rights is that individuals should be free to associate together in any way they like provided that their taking part in the activities of the group should come about as a result of their voluntary decision and they should be free to cease to take part whenever they want to.<sup>26)</sup> What makes Barry distinct from Kukathas is Barry's deep understanding of the term 'voluntariness'. When a member of a group quits or remains with the group 'voluntarily', various factors actually work behind that apparently 'voluntary' decision. Let us consider a hypothetical case here: a father belonging to a minority community might not find it cost-effective for his son to learn ethnic language. He might want his son to learn dominant language and get assimilated to mainstream culture as soon as possible to secure a better future. If all the fathers start thinking in this way, that minority culture will cease to exist very soon. Can it be called a voluntary decision? 'Voluntariness' can be examined from the opposite aspect as well. Here one individual remains as a member of an illiberal group 'voluntarily'. But, in reality, this individual is not willing to shoulder the costs that will follow his decision to leave that group. Being a liberal, no doubt, Barry is interested in this

aspect, but it cannot logically dismantle the other side of the story.

However, if we compare Kymlicka's response to 'illiberal' groups with those of Kukathas and Barry, it is hard to call it a 'liberal' position. To the extent that Kymlicka sets 'liberal' standard to grant right to 'illiberal' groups, it goes against liberal principle, for it gives an equal right to a despotic state to put illiberal dogmas at the same position.

### 3.2. *Is Kymlicka Thesis Compatible with Liberalism?*

The mission of Kymlicka's theory of liberal culturalism is to close the gap between theory and practice. In almost all liberal societies there are group-differentiated practices. On the other hand, liberal-individualism as a theory does not recognize group rights. Kymlicka's theory tends to close this gap by claiming that in liberal democracies while a societal culture sponsored by the State promotes the language and institutions of mainstream culture, it will be an injustice to expect members of minority cultures to spend their own resources to maintain their culture. In Kymlicka's understanding it goes against the very basic philosophy of liberalism; hence minority rights must be recognized and guaranteed within liberalism. Groups can enjoy special rights as long as these rights do not violate the individual rights of members. What makes Kymlicka different from a communitarian is that he gives a liberal justification for group-differentiated practices in liberal democracies with his central argument that depriving minorities of their rights will be a violation of liberal principles of autonomy and equality. No doubt, his theory tends to make a balance between individual and group rights. However, other liberals think that this theory compromised liberal principles to accommodate group rights. They bring back the old debate of compatibility of group rights with liberal theory. This section



briefly addresses this issue.

Here we refer to Kukathas once again. Like Kymlicka, Kukathas is also very much concerned about the minority communities, but it does not give him sufficient reason to abandon, modify, or reinterpret liberalism. According to him, the very emphasis of liberalism on individual rights and liberty bespeaks not hostility to the interests of communities but wariness of the power of the majority over minorities. Thus, there is no need to look for alternatives to liberalism or to throw away the individualism that lies at its heart. Therefore, unlike Kymlicka, he finds it unnecessary to accommodate any idea of group rights to address the issues of minority. To quote him: "We need, rather, to reassert the fundamental importance of individual liberty and individual rights and question the idea that cultural minorities have collective rights."<sup>27)</sup> This proposition heavily depends on his assumption that the basis of collective rights is the rights of individuals. For Kukathas, while the interests given expression in groups do matter, they matter ultimately only to the extent that they affect actual individuals. Therefore, groups and communities have no special moral primacy in virtue of some natural priority. He criticizes Kymlicka's emphasis on the value of culture and cultural membership by saying that many cultural groups suppress individual choice and liberty in the name of culture. Very often, the interests of individuals are subordinated to the community, and these communities do not place individual autonomy and choice high in the hierarchy of values. Therefore, Kymlicka's argument that individual's membership in a cultural community helps him/her to develop his/her choice which is the essence of liberalism is not correct.

Similarly, Barry also vehemently opposes the idea of promoting these communal identities by the State although he recognizes the role played by the

communities and associations in our well-being. That the State does not lend any special weight to the norms of illiberal - or liberal - groups, is, according to him, the essence of what it means to say that a society is a liberal society.<sup>28)</sup> He is critical of Kymlicka's emphasis on 'diversity' and 'autonomy', for they refer to policies that would systematically enfeeble precisely those rights of individuals to protection against groups that liberal States should guarantee. And then he poses the right question: "How can a theory that would gut liberal principles be a form of liberalism?"<sup>29)</sup> His expression is more candid when he says: "If liberal is not somebody who believes that liberalism is true (with or without inverted commas), what is a liberal?"<sup>30)</sup> And consequently he refuses to recognize Kymlicka as a liberal on the ground that:

"A theory that has the implication that nationalities (whether they control a state or a sub-state polity) have a fundamental right to violate liberal principles is not a liberal theory of group rights. It is an *illiberal theory* with a bit of liberal hand-writing thrown in as an optional extra."<sup>31)</sup> (Emphasis added)

Here one point demands clarification. We are convinced with the arguments of Barry and Kukathas only to the extent that they are calling Kymlicka's theory an *illiberal* position. Throughout the paper, I have mentioned that there are group differentiated practices in liberal democracies; hence along with Kymlicka and Van Dyke, I do not see any valid reason not to accommodate this concept in theory. However, that does not prove that Kymlicka's theory is a *liberal* theory. Instead, discussions in preceding sections highlight the incompatibility of Kymlicka's theory with liberalism. Kymlicka stands between the communitarians and the liberals, and there is insufficient reason to call it a liberal theory. This

gives birth to a relevant question: Was Kymlicka right in developing a theory to accommodate group rights within a liberal framework? Or to put it differently: Is it necessary to formulate a 'liberal' theory of group rights? The following section deals with this issue.

### 3.3. *Invalidity of Kymlicka's Assumption on a Liberal-consensus:*

Is it necessary to formulate a theory of group rights within liberal framework? Responding to Parekh's comparable question that "[h]ow is imposing liberalism - particularly a form of liberalism which privileges autonomy - any different from imposing Christianity",<sup>32)</sup> Kymlicka claimed that in Western democracies, most members of most groups accept liberal democratic values. To quote him: "The heart of multiculturalism in the West is about how to interpret liberal democratic principles, not about whether those principles are legitimate."<sup>33)</sup> How does his theory, then, fit for non-liberal groups outside the West? And accordingly, will refusal of liberal principles by groups outside the West justify a non-liberal theory of group rights? Kymlicka's response to Parekh's question does not give us a convincing explanation for his too much inclination to liberalism. Similarly, Kymlicka's assumption that an emerging 'consensus' exists in the West in favour of 'liberal nationalism'<sup>34)</sup> can be questioned. This assumption presupposes an emergence of a 'general norm' of protecting minority rights. Of course, there are group-differentiated practices in the West. But these practices do not necessarily set any norm *ipso facto*. Kymlicka also admits it while he refers to the gap between liberal practice and theory. If this is the case, it is difficult to find any such 'consensus'. On the other hand, these practices within Western democracies can be perceived as pragmatic concessions to be made under particular circumstances rather than as a consequence of a systematic

reconceptualization of minority rights. For example, the OSCE High Commissioner on National Minorities decided in 1993 to go for the Framework Convention for the Protection of National Minorities rather than the Protocol to the European Convention on Human rights put forward by the Parliamentary Assembly with Recommendation 1201. One author comments that "[t]he relevant OSCE work is not based on the notion of enforcing human and minority rights across the board in the name of democracy, but on the more ambiguous concept that certain situation must be contained in one way or another as they threaten to develop into armed conflict - somewhat a relay of the League of Nation's approach in 1920s".<sup>35)</sup> In a recent instrumental work by Goldsmith and Posner<sup>36)</sup>, the authors too explain the absence of any normative pull behind the idea of promotion and protection of human rights. Traditionally also, it was not the West but authoritarian regimes of the East that put forward bold proposals for international minority rights standards during the Paris Peace Conference of 1946, the drafting of the UDHR, the ICCPR and many more. This comparison perhaps suggests that "one can paradoxically have a democratic state grudgingly concede on substance rather than on principles and an undemocratic state proactively concede on principles rather than on actual protection".<sup>37)</sup>

Therefore, Kymlicka's inclination to liberalism for developing a theory of group rights is based on a wrong assumption that there is a consensus in favour of liberalism or for minority rights. Perhaps this wrong assumption led him to put his 'illiberal' or at least 'not-so-liberal' theory within a 'liberal' framework. Liberal-individualism is not an answer to everything. An issue like group rights which by its very character goes beyond individualism cannot be properly addressed by liberal-individualism. Kymlicka's otherwise 'sympathetic-to-groups' theory of culturalism suffers from this inherent flaw.

#### 4. Do We Need a Different Paradigm?

Group differentiated practices are more than reality even in liberal democracies. Hence, any refusal to recognize groups as right-and-duty-bearing-units is nothing short of hypocrisy. Series of group differentiated practices and increasing discourse on group rights by the liberal scholars underscore the urgency of accommodating group rights in liberal theory. But this urgency alone does not allow the liberals to accommodate group rights within liberal framework. Group right is something beyond the ambit of liberal-individualism. The foregoing examination of Kymlicka's theory of culturalism highlights this fact. Despite all his sympathy for the minority issues, Kymlicka fails to show why his theory should be deemed as a liberal theory. Of course, this does not rule out the significance of his assertions that group rights should be acknowledged as well as protected. What is the way out then? Would it be prudent to have recourse to 'liberal' theories of Kukathas and Barry in our effort to accommodate group rights in a theoretical framework? Even being sympathetic to the issues of minorities, Kukathas do not find it necessary to prescribe any special right for groups, for liberal individualism is sufficient to that end. He puts so much emphasis on the freedom of association that he finds it unjustified for States or other liberal groups to interfere into the internal affairs of illiberal groups as long as membership to such groups is voluntary, and he believes this arrangement gives protection to groups. This is the least possible thing. Practising individualism at state level and just leaving culturally vulnerable groups on their own would be the last means to protect them. Kukathas himself is aware of this fact. In one place, he explained how the Maori communities had been transformed from a collective social life to individual way of living. "The cause of this change was the possibility of living the community."<sup>38)</sup> I find Kukathas's

thesis more problematic when he asserts that

"[i]f groups are recognized as having rights as *groups*, it is must more difficult to justify mechanisms that vary their political entitlements with their size and influence. It is far better then to maintain an emphasis on the rights and liberties of individual, while conceding that institutions have to be designed with a view to protecting those liberties by accommodating (and guarding against) the vagaries of group power."<sup>39)</sup>

This argument is historically disproved and any proposition that all group rights are reducible to individual rights is no less than ridiculous. Barry's position is even more conservative. His theory of group rights is meant for illiberal groups, for he finds any such arrangement for liberal groups unnecessary. To quote him:

"[T]he only ways of life that need to appeal to the value of cultural diversity are those that necessarily involve unjust inequalities or require powers of indoctrination and control incompatible with liberalism in order to maintain themselves. Since such cultures are unfair and oppressive to at least some of their members, it is hard to see why they should be kept alive artificially."<sup>40)</sup>

The proposition that with embracing liberalism, groups will give up their demand for separate cultural rights is not correct. Both the majorities and minorities may agree on liberal-democratic principles, but they disagree on the implications of these principles for concrete questions about the distribution of power, or about the legitimacy of affirmative action, and so on.<sup>41)</sup>

Given the reluctance of liberals to recognize the relevance of group rights

and the incompatibility of 'liberal' culturalist position with liberalism, we need to deviate from liberalism to accommodate group rights. At the same time, it is also necessary to protect individual rights of the members so that they do not fall prey to unjustified treatment in the name of culture or religion. Kymlicka's theory attempted to make such a balance, but that was flawed in developing the idea within liberal framework. Most interestingly, mainstream liberals have refused to call it a liberal position. Addressing group needs on the basis of such an ambivalent theory would necessarily make the whole project questionable. This makes obvious the need for a more sophisticated balance between group rights and individual rights going beyond liberal legacy. Thus, to accommodate group rights in a theoretical framework we do need to deviate from liberal-individualism and we do need a different paradigm. Ignoring the need for a different paradigm will eventually amount to ignoring the need for group rights, and this will be too costly to afford. However, the details of such a paradigm are outside the scope of the present work. My endeavour in this paper was to portray the inherent drawbacks of liberalism as a theory in accommodating group rights by critically examining the liberal culturalist position of Will Kymlicka. Here I do not intend to be a critic of liberal-individualism *per se*; what I am suggesting is that 'one size does not fit all'.

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1) See generally F. Fukuyama 'The End of History', 16 *The National Interest* (1989).

2) V. Van Dyke, 'The Individuals, the State, and Ethnic Communities in Political Theory', 29:3 *World Politics* (1977) pp. 343-369.

5) *Ibid.*, pp. 347-349.

6) *Ibid.*, p. 350.

7) *Ibid.*, p. 353.

8) *Ibid.*, p. 355.

9) *Ibid.*, p. 357.

10) *Ibid.*, pp. 358-359.

11) V. Van Dyke, 'Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought' in J. Stapleton (ed.), *Group Rights - Perspective Since 1900* (Thoemmes Press, Bristol, 1995) pp. 180 - 200.

12) Van Dyke, *supra* note 2, p. 343.

13) *Ibid.*, p. 369.

14) Van Dyke, *supra* note 11, pp. 188-190.

15) Van Dyke, *supra* note 2, p. 344.

16) W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, Oxford, 1995).

17) W. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford University Press, Oxford, 2001) pp. 51-52.

18) See generally *ibid.*, pp. 53-66.

19) Societal culture is defined as a set of institutions, covering both public and private life, with a common language, which has historically developed over time on a given territory, which provides people with a wide range of choices about how to lead their lives.

20) The term national minority is understood here by Kymlicka as groups who formed functioning societies on their historical homelands prior to being incorporated into a larger state.

21) Kymlicka, *supra* note 17, pp. 22-23.

22) D. Hume, David, *Enquiries Concerning Human Understanding and Concerning The Principles of Morals* cited in C. Kukathas, 'Are There Any Cultural rights?' in Stapleton, J. (ed.), *supra* note 11, p. 281.

23) See generally C. Kukathas, 'Are There Any Cultural rights?' in Stapleton, J. (ed.), *supra* note 11, pp. 258-298.

24) *Ibid.*, p. 289.

25) B. Barry, *Culture and Equality* (Polity Press, Cambridge, 2001) pp. 112-154.

26) *Ibid.*, p. 148.

27) Kukathas, *supra* note 23, p. 261.

28) Barry, *supra* note 25, p. 125.

29) *Ibid.*

30) *Ibid.*, p. 132.

31) *Ibid.*, p. 140.

32) Kymlicka *supra* note 17, p. 56.

- 33) *Ibid.*, p. 61.
- 34) According to liberal nationalism, it is a legitimate function of the state to protect and promote the national cultures and languages of the nations within its borders.
- 35) G. Pentassuglia, 'Minority Rights and the Role of Law: Reflections on Themes of Discourse in Kymlicka's Approach to Ethnocultural Identity', 4 *Journal on Ethnopolitics and Minority Issues in Europe* (2002).
- 36) J. L. Goldsmith and E. A. Posner, *The Limits of International Law* (Oxford University Press, New York, 2005).
- 37) Pentassuglia, *supra* note 35.
- 38) Kukathas, *supra* note 23, p. 290.
- 39) *Ibid.*, pp. 295-296.
- 40) *Ibid.*, p. 135.
- 41) Kymlicka, *supra* note 17, p. 60.